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STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15 of this Court, Alaska Truck Transport, Inc., appellant, submits herewith this statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment of the United States District Court for the Western District of Washington Northern Division entered on March 16, 1967.

OPINIONS BELOW

The opinion of the specially constituted District Court of three judges is attached hereto as Appendix A. The final judgment of the District Court is attached hereto as Appendix B. The report of the Interstate Commerce Commission is found at 99 M.C.C. - 668.

BASIS OF JURISDICTION

I

This is an action brought by Lynden Transfer, Inc. and North American Van Lines, Inc. to annul, set aside and enjoin an order of the Interstate Commerce Commission entered under Section 207(a) of the Interstate Commerce Act.

II

The final judgment of the United States District Court for the Western District of Washington Northern Division, was entered on March 16, 1967. Notice of appeal was filed in said Court on May 15, 1967. By order entered July 18, 1967 the time for docketing this appeal was extended to August 13, 1967.

III

The jurisdiction of this Court to review on appeal the final judgment of the District Court is conferred by 28 U.S. C.A. - 1253.

IV

Cases which sustain the jurisdiction of this Court to review on appeal the final judgment of the District Court are: King v. United States (1952), 344 U.S. 254, 73 S.Ct. 259, 97 L.Ed. 301; Railroad Commission of Wisconsin v. Chicago, B.&Q. R.R. Co. (1922, 257 U.S. 563, 42 Ct. 232, 66 L.Ed. 371, 22 A.L.R. 1086; Northern Pacific Railway Co. v. Montana (1952), 344 U.S. 905, 73 S. Ct. 329, 97 L.Ed. 699.

V

The principal provisions of the Interstate Commerce Act which are involved in this proceeding are as follows: Sec. 203 (b6)(as amended Aug. 12, 1958) 72 Stat. 574 (see amended b and c); Sec. 206 (a) (1); Sec. 206 (a)(2),(3),(4) and (5) (as amended March 1, 1950) 64 Stat. 574; Sec. 206(b); Sec. 207(a) 49 Stat. 551; and Sec. 210(a) 56 Stat. 177.

QUESTIONS PRESENTED

The questions presented by this appeal are whether, in setting aside and permanently enjoining the order of the Interstate Commerce Commission issuing, under Sec. 207(a) of the Interstate Commerce Act, certain interstate authority on the grounds that such order was not supported by substantial evidence of record; that applicant was in willful violation of the law; that the "grandfather" "color of right" and "color of law" aspects, completely ignored by the District Court, were of any consequence; that exhibits 2,3 and 4 reflecting representa-

tive shipments from 1956 to 1962 which were originally exhibits in MC-118520 Sub 5 "grandfather" (see tr. pg. 12, lines 20-25) and could not be properly assessed as to their value by the Court without studying the transcript of the testimony relative to these representative shipment exhibits in the "grandfather" proceeding; and whether the District Court misapprehended or grossly misapplied the latitude granted by the Courts to the Commission in exercising their expertise as an administrative and regulatory body. See Armored Carrier Corporation v. United States, Civil Action No. 65-C-1298 U.S. District Court Eastern District New York; Washburn Storage Co., Extension-Household Goods, 29 M.C.C 116 at 119; Alaska Truck Transport, Inc., Extension-Alaska M.C.C. 668 at 677.

STATEMENT OF THE CASE

This is an appeal from a final judgment of a specially constituted United States District Court of three judges which set aside and enjoined a report and order of the Interstate Commerce Commission entered under Sec. 207(a) of the Interstate Commerce Act. The report was entered Sept. 23, 1965 in Docket No. MC-118520 (Sub No. 3), Alaska Truck Transport, Inc. Extension-Alaska, 99 M.C.C. 668, and an order of the Commission of January 28, 1966 which denied petitions for reconsideration.

In the report and order of Sept. 23, 1965, the Commission found that the present and future public convenience and necessity required operation by applicant Alaska Truck Transport, Inc., in inter-

state or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of general commodities, except Class A and B explosives and commodities in bulk, in tank vehicles, between Great Falls, Montana, and Seattle, Washington on the one hand, and, on the other, points in Alaska, except those east and south of an imaginary line constituting a southbound extension of the international boundary between the United States (Alaska) and Canada (Yukon Territory), except Haines, Alaska; that applicant was fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder; that a certificate authorizing such operations should be granted; and that the application in all other respects should be denied.

In late 1958, after Congressional approval of the Alaska Statehood Act, the Interstate Commerce Commission decided that since the Statehood Act did not make specific provision for the issuance of "grandfather" rights to carriers already engaged in transporting Alaska traffic, the Congressional intent, read from its action in handling similar situations in the past, must be presumed to provide for the protection of continued operations by carriers engaged in operations on or before the effective date of the Alaska Statehood Act, and, as a result, decided to issue Temporary Authorities to cover the interim period until legislation providing for "grandfather" grants of authority was enacted. Alaska Truck Transport, Inc. filed applications for Temporary Authority. Its initial Temporary Authority under Docket No. MC-118520 TA

was issued January 5, 1959. The scope of this authority was "General Commodities (including household goods as defined by the Commission) and excepting Class A and B explosives, articles of unusual value, between points in Alaska. A like application for permanent authority was filed and assigned Docket No. MC-118520 Sub 1. On the advice of the District Supervisor of the Interstate Commerce Commission, Mr. William F. Meehan, Jr., an application for authority between points in Alaska, on the one hand, and, on the other, points in Washington and Montana was filed separately. This was assigned Docket No. MC-118520 Sub 2, but was subsequently denied because through lack of knowledge of the requirements, we failed to show an immediate and urgent need. The Commission, for reasons unknown, did not treat this as an interim Temporary Authority application, but required proof of an immediate and urgent need, as provided by the statutes, Sec. 210a(a). A new application for Temporary Authority with evidence supporting an immediate and urgent need was filed and on Aug. 17, 1959 a like application for permanent authority was filed and assigned Docket No. MC-118520 Sub 3. The immediate and urgent need was proved by applicant and, subsequently, Temporary Authority under MC-118520 Sub 4 was granted on Sept. 4, 1959. This Temporary Authority was for "General Commodities, but excepted household goods because it is virtually impossible to prove an immediate and urgent need for household goods service. This was substantiated and recognized by the Commission with the first nationwide grant of authority to Mayflower 20 M.C.C. 633. It stated t herein that the diffi-

culty and impossibility of securing substantial shipper testimony in household goods extension cases was due to the non-recurring nature of the traffic involved and it must view the evidence presented with extreme liberality in order to authorize any extensions. At this time, Mr. William F. Meehan, Jr., District Supervisor for the Interstate Commerce Commission, again advised that Alaska Truck Transport, Inc. in view of the history of prior "grandfather" Acts, which had always provided for continued operations by carriers operating on the effective date of "grandfather" legislation, could continue operations without a certificate or permit pending a final determination of its application filed in accordance with the "grandfather" legislation, Interstate Commerce Act Sec. 203(23)(b)(6), as amended Aug. 12, 1958, 72 Stat. 574; Sec. 206 (a)(1), 54 Stat. 923; Sec. 206(a)(2)(3), 64 Stat. 574, amended and effective Sept. 1, 1950; Sec. 206(a)(3)(b), 49 Stat. 551. (See Exhibit 10, affidavat of Mr. Meehan, in motion of Alaska Truck Transport, Inc. for new trial.)

Congress passed the "Alaska Grandfather Amendment" to the Interstate Commerce Act, Sec. 206 (a)(4) and (5), effective July 12, 1960. This amendment provided that if application was made to the Commission before Dec. 31, 1960, pending the final determination, continuance of operations without a certificate would be lawful. Alaska Truck Transport, Inc. on Dec. 27, 1960 filed its "grandfather" application and, in an attached Appendix A, Sec. II, stated in part: "Our original grant of authority, MC-118520 TA, included household goods, as defined by the Commission, between points in Alaska. In our subse-

quent grant of authority under MC-118520 Sub 4 TA, household goods, as defined by the Commission, were excepted due to our not proving an urgent and immediate need. It is an accepted fact that proving an urgent and immediate need for transporting household goods, as defined by the Commission, is practically impossible. We have continued to transport household goods, as defined by the Commission, between points being applied for in the instant application and Alaska upon the advice of Mr. William Meehan, District Supervisor, Interstate Commerce Commission. He informed us that, in his opinion, until our application for permanent authority was decided, or the pending "grandfather" legislation was passed, we should be able to continue an operation that had commenced prior to the proposed "grandfather" date, Aug. 26, 1958." Jan. 17, 1961 a letter was received from the Interstate Commerce Commission advising that our application under the "grandfather" provisions of the Act seeking authority to transport general commodities including household goods as defined by the Commission, and excepting articles of unusual value, and Class A and B explosives, (1) between points in Alaska. (2) between points in Alaska, on the one hand, and, on the other, points in Washington and Montana and Portland, Oregon had been assigned Docket No. MC-118520 (Sub No. 5). This letter also referred to our not having rates filed to and from Portland, Oregon. We immediately joined Pacific Inland Tariff Bureau, which provided these rates. This letter is Exhibit 9 in the motion of Alaska Truck Transport, Inc. for a new trial.

The Alaska "Grandfather Act" Sec. 206

(a)(4) and (5) differs radically from the prior "grandfather" acts in two respects. Prior "grandfather" amendments provided that a carrier had to have been in "bona fide" operation in order to qualify. The Alaska "grandfather" Act specifically excludes the term "bona fide". The Congressional intent in excluding the term "bona fide" has been interpreted by the Commission as having been intentional and, in essence, requiring extreme liberality in issuing authorities to Alaska domiciled carriers (see guideline "grandfather" case, Al Renk & Sons, Inc. Alaska "Grandfather" Application, 89 M.C.C. 91, also, Herda Alaska Truck Lines, Inc., Extension-Alaska, 98 M.C.C. 137 at 142 and 143). The other difference is that it does not provide an "interim application" as did all prior "grandfather" amendments. At no time did the Commission, verbally or in writing, interpret the Alaska Grandfather Act as having no interim application or having terms disqualifying Alaska Truck Transport, Inc. as an applicant for "grandfather" authority between Alaska and Washington and Montana.

Our initial Temporary Authority MC-118520 TA and our Temporary Authority MC-118520 Sub 4, originally issued under Sec. 210a of the Act for not more than 180 days, were indefinitely extended by the Commission for their own administrative convenience. This being counter to the provisions of the Act, we are not aware of their authority for this extension. All "grandfather" applicants were advised that their applications for authority under Public Convenience and Necessity would not be heard until such time as their "grandfather" applications were heard and decided. Our "grandfather"

application was heard by Chief Examiner Cheseldine on the 8th, 9th and 10th of October, 1962 at Anchorage, Alaska. March 7, 1963 a report and order was served by Chief Examiner Cheseldine approving the "grandfather" application in so far as between points in Alaska was concerned. The portion filed under Sec. 206 (a)(4) of the Act was denied because we were not performing pursuant to a certificate on Aug. 26, 1958 and thereafter. This was the first indication ever received that we did not qualify as a "grandfather" carrier. Applicant filed exceptions to the recommended order which were denied by the Review Board July 18, 1963. Applicant then filed a petition for reconsideration with Division 1. This, too, was denied in May of 1964. Our application for a certificate under Public Convenience and Necessity, MC-118520 Sub 3, was set for hearing Aug.2, 1963, four years after its filing. Applicant had asked for and received advice from Commission personnel in Anchorage and in Washington, D.C. as to how extensive a presentation he should have for this hearing. Applicant was advised that a few representative witnesses and the exhibits from the "grandfather" Sub 5 proceeding would suffice. Chief Examiner Cheseldine advised all parties before opening the proceeding that this hearing on Public Convenience and Necessity, Sub 3, was in essence a continuation of the "grandfather" Sub 5, proceeding and that he intended to consider the record and exhibits of that hearing as a part of this one. June 3, 1964 a report and order recommending issuance of authority applied for was entered by Examiner Cheseldine. Exceptions were

filed and the Review Board, on Dec. 8, 1964, found that applicant was not entitled to household goods authority or to general commodity authority between Seattle, Washington and points in Alaska. Applicant filed a petition for reconsideration with Division 1 and in March of 1965 it entered an order agreeing with the findings of the Review Board. Chief Examiner Cheseldine heard both the "grandfather" Sub 5 and the PC&N Sub 3 proceedings and considered the record of both in arriving at his favorable decision. Obviously, the Review Board and Division 1 did not consider the record of the "grandfather" proceeding in reversing portions of the Chief Examiner's recommended order. April 7, 1965 Alaska Truck Transport, Inc. filed a petition for a finding of general transportation importance with the full Commission. May 19, 1965 the Commission issued an order that no issue of general transportation importance was involved, but on their own motion, reopened the proceeding on the present record. We will not presume to state specifically the full Commission's reason for reopening this matter for reconsideration. However, the application of cause and effect and the rule of reason would indicate that although applicant's petition for a finding of general transportation importance was denied one or more of the issues contained therein pointed to errors and/or omissions in the findings of the Review Board and Division 1. As a consequence, the only way the full Commission could justly rectify the errors was to reopen the proceeding on their own motion for reconsideration.

Sept. 23, 1965 the full Commission

set aside the findings of the Review Board and Division 1 and issued a recommended order for authority substantially the same as that recommended by Chief Examiner James C. Cheseldine. Petitions for reconsideration were filed by protestants and were denied on Jan. 28, 1966. March 23, 1966 a certificate of Public Convenience and Necessity was issued under Docket No. MC-118520 Sub 3 granting authority over irregular routes for "General commodities, except Classes A and B explosives and commodities in bulk, in tank vehicles, between Great Falls, Montana, and Seattle, Washington, on the one hand, and, on the other, points in Alaska, except points east of an imaginary line constituting a southward extension of the United States (Alaska) - Canada (Yukon Territory) boundary line other than Haines, Alaska."

March 14, 1966 Lynden Transfer, Inc. and North American Van Lines, Inc., protestants in MC-118520 Sub 3, filed a complaint to enjoin, set aside and annul the order of the Interstate Commerce Commission in the United States District Court for the Western Division of Washington, Northern Division. It was designated as Civil Action No. 289 and named the United States of America and the Interstate Commerce Commission as defendants. Dec. 1, 1966 Alaska Truck Transport, Inc. filed a motion to intervene as an additional defendant. Dec. 9, 1966 a hearing was held before a three judge Court in Seattle, Washington. Motion to intervene by Alaska Truck Transport, Inc. was granted unanimously. Feb. 9, 1967 an opinion was filed finding for the plaintiffs and remanding the case to the Interstate Commerce Commission for further proceedings

consistent with this opinion. March 16, 1967 a decree was entered. May 15, 1967 Alaska Truck Transport, Inc. filed a motion for a new trial and relief from judgment. It was late filed because the opposing counsel failed to serve intervenor Alaska Truck Transport, Inc., a copy of the final order entered by the Court. The Clerk of the District Court agreed such service was not made. North American Van Lines, Inc. filed a motion to strike the motion of Alaska Truck Transport, Inc. for a new trial and relief from judgment on the basis of its late filing. Motion granted. Also filed on May 15, 1967 by Alaska Truck Transport, Inc. was its notice of appeal. By order entered July 18, 1967 the time for docketing this appeal was extended to Aug. 13, 1967.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In this case the appellant is asking the Court to condemn a philosophy of judicial review based upon the application of a technique and a standard which are completely at variance with those previously established by this Court. The standard applied by the District Court in this case determining the substantiality of the evidence, far from being sanctioned by Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-621, and is based upon a misapprehension and gross misapplication of the standard approved by the Court in that case. The same may be said of the District Court's interpretation and application of the Court's reasoning in Armored Carrier Corporation v. United States, 260 F. Supp. 612 (E.D.N.Y. 1966) and Best Way Motor Freight, Inc. v. United States, 253 F. Supp. 314, 319 (W.D.

Wash. 1966), relative to unauthorized operations, whether willful or inadvertant.

The following briefly stated errors made by the District Court show how far the District Court strayed from the standards which this Court has set up for reviewing orders of the Commission granting authority under Sections 203 (b6), as amended; 206 (a)(1),(2),(3),(4) and (5), as amended; 207(a) and 210(a) of the Act.

a.

The Court erred in concluding that there was no substantial evidence adduced at the hearing to support the finding that there was a need for the services of applicant. Exhibits 2, 3, 4 and 5 reflect representative shipments of 1956 to 1962, originally submitted as exhibits in the "grandfather", Sub 5, proceeding. Exhibit 7 shows comparative gross receipts of 1959 through 1963. An analysis of representative shipment exhibits in conjunction with Exhibit 7, gross receipts, will reveal that the representative shipment exhibits reflect only a small percentage of the total traffic handled in the period shown. As an example, Exhibit 3 shows a total weight of 445,464 pounds. This is for the year 1960. For the Fiscal year 1960, an audited statement by Ernst & Ernst shows gross receipts of $418,927. If the 445,464 pounds shown had been the total volume of traffic, as stated by plaintiff's counsel and accepted by the District Court, we would have charged our shippers approximately $94.00 CWT. Actually, our tariff rates covering all commodities handled average approximately $9.00 CWT. In other words Exhibit 3, representative shipments for 1960, when analyzed in conjunction with the same period's gross receipts proves that the Exhibit shows

approximately 10% of the total volume handled. A like analysis of the gross receipts of subsequent years give a true picture of the actual volume of traffic handled by Alaska Truck Transport, Inc.

b.

The District Court erred in stating: "plaintiff aptly points out, and the Government concedes, that the latest shipment of non-household goods between Seattle and Alaska shown in those records occurred in 1962. Testimony at the hearing by applicant's President indicates that this abrupt cessation of this portion of their shipping business resulted, at least in part, from the award of a mail contract to an authorized carrier." The District Court further states the records, therefore, at best offer no evidence in support of the need for an authorization to applicant to transport non-household goods between Seattle and Alaska. While no exhibits reflecting representative shipments of non-household commodities moving between Seattle or Great Falls and points in Alaska were submitted, due to the advice of Commission personnel that a few shipper witnesses and testimony of applicant's President would suffice, financial statements reflecting gross revenues were submitted as Exhibit 7. They show gross receipts at March 31, 1962 of $474,627. At March 31, 1963 they show $367,789. The District Court stated applicant's President testified there was an abrupt cessation of service. A reading of the transcript contradicts this statement (tr. pg. 16 at line 5 through 11). Applicant's President testified that it holds out and performs general commodity service between Seattle and Alaska an average of 1½ to 2 trips week-

ly. He further testified (tr. pg. 24 lines 12 through 25 and pg. 25, line 1 through 17) that the mail contract awarded Garrison Fast Freight, a division of Consolidated-Freightways, had the effect of reducing the traffic available to his company and that its revenues had declined $107,000 as indicated in Exhibit 7. He further testified that prior to the awarding of the mail contract, the only competition for highway traffic of which he was aware was that of Lynden Transfer, Inc. Before the inception of the mail contract, applicant operated 3 to 4 trips weekly. He also testified that frequent trips were still run via the Alaska highway, that facilities were still maintained in Seattle and that solicitation for highway freight continued. The District Court points to the award of the mail contract to an "authorized" carrier. Let it be noted that all Alaska highway carriers, Lynden, Garrison-Consolidated, and Alaska Truck Transport were operating pursuant to Temporary Authorities.

c.

The District Court erred in stating that while there was an increasing volume of shipments of household goods, since they were made without authority they were unlawful. The District Court then grossly misinterprets Armored Carrier Corporation v. United States, 260 F. Supp. 612 (E.D.N.Y. 1966) when stating illegality of past operations does not disqualify an applicant where its unauthprized operations are carried on under "color of law". In Armored Carrier the Court stated that "the argument that past wiliful violations should, per se, bar a grant of authority in the present or the future is one that looks backward and appears transfixed. Examination of the

past should only be useful in assessing prospective conduct of the applicant. Such assessment is one peculiarly within the expertise of the I.C.C. and should not be interfered with unless found to be arbitrary and capricious.". In Best Way the Court did not find it necessary to rule on willful misconduct since Okanogan operated under "color of law".

d.

The District Court erred when stating that because the Temporary Authority granted in December of 1959 between Alaska and Seattle and Great Falls excluded household goods, from that date forward applicant, being fully aware it was prohibited by law, was in willful violation of the law, therefore this evidence is not admissible to show the need for the service. This directly contradicts the findings of the Court in Armored Carrier Corporation v. United States, 260 F. Supp. 612, (E.D.N.Y. 1966). The District Court, the Review Board and Division 1 overlook the fact that our original Temporary Authority granted Jan. 5, 1959 under MC-118520 TA, included authority to originate household goods, as defined by the Commission, in interstate commerce. When the Commission granted Temporary Authority, under MC-118520 Sub 4, Sept. 4, 1959 for general commodities between Alaska and Seattle and Great Falls, we were able lawfully to originate household goods shipments under our Sub 4 authority. Household goods is described as a general commodity in the National Motor Freight Classification under Item No. 100200. It also names class ratings and minimum rate factors. All highway general commodity carriers move household goods in this

manner. (See Exhibit 16, Alaska Truck Transport, Inc. motion for new trial.) Applicant continued transporting household goods with the express permission of the Commission because of the pending "grandfather" legislation. The Commission permitted continued tariff participation covering household goods. In December of 1960 pursuant to Sec. 206(a)(4) and (5), of the Interstate Commerce Act, as amended, the Alaska "Grandfather" Act, Alaska Truck Transport, Inc. filed its "grandfather" application and on Jan. 17, 1961 the Commission by letter accepted it and assigned it Docket No. MC-118520 Sub 5. The District Court failed to recognize that all prior "grandfather" amendments to the Act and the Alaska "grandfather" amendment contain a provision that continued operations will be lawful without a certificate or permit pending a final determination of such application. The Interstate Commerce Commission found the operations of Alaska Truck Transport were conducted under "color of law" during the pendency of its application.

e.

The District Court states that household goods moved by applicant before Dec. of 1959 are too remote to be of any probative value in determining the need for applicant's services in 1963. It fails to give any recognition to the fact that Alaska Truck Transport, Inc. was a pioneer "grandfather" carrier via the Alaska highway prior to commencement of operations by either of the plaintiffs, Lynden Transfer, Inc. or North American Van Lines, Inc. The expressed Congressional intent that Alaska carriers be treated with liberality was recognized by Chief Examiner James C. Cheseldine, who heard

both our "grandfather" Sub 5 proceeding and our Sub 3 at issue herein. The First one and a half pages of his favorable recommended order are devoted almost exclusively to the "grandfather" aspects of this Sub 3 application. The full Commission in their report and order of Sept. 23, 1965 repeatedly refer to the "grandfather" aspects. A reading of the transcript and opinion of the District Court hearing shows that absolutely no consideration was given the "grandfather" aspects of the case. The District Court repeatedly queried counsel for the Commission as to why the full Commission should have taken the unusual action of reopening a case that had been finally determined by an appellate division (D.C. trs. pg. 19, lines 1 through 19 and pg. 31, line 6 and pg. 42, line 2). It would seem to logically follow that the reasons contained in applicant's petition for a finding of general transportation importance awakened the full Commission to the fact that the "grandfataer" "color of right" and "color of law" aspects had been overlooked by the Review Board and Division 1

f.

In order for the District Court to properly assess representative shipment exhibits 2, 3, 4 and 5, originally exhibits in the Sub 5, "grandfather" proceeding, it would have been necessary to study the transcript of the "grandfather" proceeding. The testimony in the Sub 3 proceeding does not reveal the percentage of the total volume exhibits 2, 3, 4 and 5 represent. However, in the "grandfather" transcript at page 46, lines 6 through 13, Douglas Lantz, President of

Alaska Truck Transport, Inc., testified that, depending on commodity, they would represent as little as one percent and as high as twenty percent of the total transported. The "grandfather" proceeding is relevant because it shows the "good faith" and "color of right" operations of applicant, a major issue in this proceeding.

g.

The District Court does not believe that three shipper witnesses are sufficient to show a need for services of applicant. Yet Mayflower at 20 M.C.C. 633 received nationwide household goods authority without one shipper witness. Thereafter, based upon the testimony of five shippers, a nationwide household authority was granted North American Van Lines, Inc. 42 M.C.C. 839. The criteria set by the Commission in the Mayflowercase has been constantly restated through the years. It has established the fact that the non-recurring nature of household traffic makes the securing of shipper witnesses virtually impossible. The single shipper witness supporting household goods in this hearing stated his dissatisfaction with the services provided by carriers domiciled in the contiguous 48 states. This witness, representing Ernst & Ernst, a national accounting firm, testified as to the desirability of having an Alaska based carrier handling his firm's moving business. Mr. Kenneth Maxfield, Assistant to the President of North American Van Lines, Inc., testified that North American provides no highway service north from Seattle, but turns Alaska destined shipments to Smyth at Seattle for water movement (tr. pg. 146, lines 1 through 25 and pg. 147, lines 1 through 8). In view of the testimony of

the foregoing two witnesses and even though North American holds authority between Seattle and Alaska, there is no highway service on household goods provided by any carrier except that provided by applicant, Alaska Truck Transport, Inc. The Commission, therefore, was correct in granting authority. Applicant was advised by the Commission that a few supporting shipper witnesses would suffice even though many more were available.

h.

The District Court volunteers (tr. pg. 43, line 12-16) that the general commodity operation will be performed without any backhaul. Counsel for plaintiff concurs saying that there is no evidence in this proceeding of any backhaul. This is contrary to the facts in that household goods available to applicant is not balanced, but moves at a ratio of approximately 6 to 1, southbound over northbound, as shown in prior proceedings.

CONCLUSION

Normally judicial reviews of the orders of the Interstate Commerce Commission under Sec. 206(a)(1), (2),(3),(4), (5) and 207(a) recognize the expertise of the Commission. A long line of cases of the Supreme Court define the limited review permissible. The cases cited by the District Court all tend to support the position of the Interstate Commerce Commission in granting authority to Alaska Truck Transport, Inc. Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-621; Armored Carrier Corporation v. United States, 269 F. Supp. 612 (E.D.N.Y. 1966); Best Way Motor Freight, Inc. v. United States, 253 F. Supp. 314, 319 (W.D.Wash. 1966). The District Court is obviously

misinterpreting and misapplying the findings in the cases cited and presents a substantial question for the consideration of this Court and one of importance to the Commission, the motor carriers and the shippers.

Dated at Anchorage, Alaska this 8 day of September, 1967.

Respectfully submitted,

Douglas Lantz

Douglas Lantz, Per Se
for the appellant,
Douglas Lantz d/b/a
ALASKA TRUCK TRANSPORT, INC.

AFFIDAVIT OF MAILING

STATE OF ALASKA)
) SS.
THIRD JUDICIAL DISTRICT)

DOUGLAS LANTZ, being first duly sworn, deposes and says:

I am Douglas Lantz d/b/a Alaska Truck Transport, Inc., appellant in this action.

On the 8th day of September, 1967 a copy of the Jurisdictional Statement and of the Affidavit of Mailing were air-mailed by me to James T. Johnson and Martin A. Weissert, counsels for appellees, the General Counsel, I.C.C. and the Solicitor General of the United States by depositing said documents in a United States Mail Box, postage prepaid, after inserting them in envelopes addressed as shown in the record.

DATED this 8th day of Sept., 1967 at Anchorage, Alaska.

Douglas Lantz
Douglas Lantz

SUBSCRIBED AND SWORN to before me this 8th day of Sept., 1967.

Ronald E. Van Sickle
Notary Public in and for the State of Alaska

My commission expires: 4/9/70

APPENDIX A

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
Feb. 9, 1967
HAROLD W. ANDERSON, CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

LYNDEN TRANSFER, INC. and NORTH AMERICAN VAN LINES, INC., Plaintiffs, v. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.	No. 289 OPINION

Before: HAMLEY, Circuit Judge, and LINDBERG and BEEKS, District Judges.

BEEKS, District Judge:

This court is called upon to write yet another chapter in the seesaw history of a carrier's application for a certificate of public convenience and necessity.

Alaska Truck Transport, Inc., of Anchorage, Alaska, hereinafter called "applicant", filed its application in August of 1959 requesting authority in the form of a certificate of public convenience and necessity to transport certain classes of commodities, including household goods, by motor vehicle between points in Alaska and Seattle, and between Alaska and Great Falls, Montana. Certain other carriers registered their objections to the application at a hearing held in Anchorage in August of 1963. The hearing examiner, in his report served in June of 1964, recom-

mended that the application be granted in all respects here relevant. After the parties filed their exceptions to the recommendations of the hearing examiner, the I.C.C.'s Operating Rights Review Board reviewed the record, and in December of 1964 entered its finding that the applicant had failed to establish the need for two major portions of its proposed service: the transportation of household goods, between Alaska and either Seattle or Great Falls, and the transportation of other commodities between Alaska and Seattle. The Review Board left intact, however, the grant of authority to carry commodities other than household goods between Alaska and Great Falls. Applicant then petitioned for reconsideration, but the Commission, Division 1, acting as an appellate division, denied the petition, "for the reason that the findings of the Operating Rights Review Board Number 3 are in accordance with the evidence and the applicable law." Applicant then sought a determination that an issue of general transportation importance was involved, but the Commission, by order of May 12, 1965, found that no such issue was involved. In the same order, however, for reasons which do not appear, the Commission reopened the proceeding for reconsideration upon its own motion; and after reconsideration, in an opinion filed September 23, 1965, to which there were four dissents, reversed the order of the Operating Rights Review Board and entered an order substantially identical to that recommended by the hearing examiner. The basic import of the Commission order was to grant applicant the authority to transport general commodities, including household goods, between points in Alaska and

both Seattle and Great Falls. The petitions of North American Van Lines, Inc., ("North American") to vacate the order and of Lynden Transfer, Inc. ("Lynden") for reconsideration were denied, and the certificate was issued.

Lynden and North American then filed this action, requesting that this court find the Commission's order beyond the lawful authority of the I.C.C. and void, and that this court set it aside and enjoin its enforcement. North American challenges only that portion of the order which authorizes applicant to transport household goods. Lynden challenges only that portion which authorizes applicant to transport other commodities between Seattle and Alaska. Neither plaintiff challenges the grant of authority to transport commodities other than household goods between Great Falls and Alaska.

Plaintiffs make two distinct attacks upon the order of the Commission. First, they contend that the Commission was without authority, under the applicable statutes and under its own rules, to reopen the proceedings for reconsideration upon its own motion, once the case had been remanded to the appellate division and that body had upheld the Operating Rights Review Board. Secondly, they contend that there was no substantial evidence to support the relevant grants of authority, and that therefore the Commission acted arbitrarily and capriciously in so doing.

Plaintiffs have made a prepotent argument in support of their contention that the Commission was without authority to reopen these proceedings for reconsideration upon its own motion; and that therefore the order which followed that reconsideration was unlawful and void.

On the state of the record before us, however, we need not reach that question, for we conclude that there was no substantial evidence adduced at the hearing to support the finding that there was a need for the services of applicant which are here being challenged. A review of the relevant evidence is therefore indicated.

Applicant relies heavily upon four exhibits offered into evidence at the hearing which constituted a record of applicant's operations between Alaska and the Continental United States in the period of 1956-1963. Plaintiffs aptly point out, and the Government concedes, that the latest shipment of non-household goods between Seattle and Alaska shown in those records occurred in January of 1962. Testimony at the hearing by applicant's president indicates that this abrupt cessation of this portion of their shipping business resulted, at least in part, from the award of a mail contract to an authorized carrier, and the improvement in the other carrier's services which that award made possible. The records, therefore, at best offer no evidence in support of the need for an authorization to applicant to transport non-household goods between Seattle and Alaska.

The exhibits do show a substantial and increasing volume of shipments of household goods by applicant. Such shipments, however, were made by applicant without authority, and were therefore unlawful. The illegality of past operations does not, ipso facto, disqualify an applicant attempting to gain such authority. Armored Carrier Corporation v. United States, 260 F. Supp 612 (E.D.N.Y. 1966). In fact, there is authority for the position that

where unauthorized operations are carried on "under color of law," a record of those operations may constitute evidence of a need for the services provided. Best Way Motor Freight, Inc. v. United States, 253 F. Supp. 314, 319 (W.D. Wash. 1966) and cases cited therein. However, where those operations are carried on in wilful disregard of the law, they may not be used as evidence for this purpose. We cannot allow a carrier to better his position by electing to flout the law rather than to obey it. Such is the situation in the case at bar. In separate proceedings in December of 1959 applicant was granted temporary authority to transport general commodities between Alaska and Seattle and Great Falls; but household goods were specifically excluded from that grant of authority. From that date forward, at least, applicant was fully aware that it was prohibited by law from transporting household goods between the continental United States and Alaska. We hold that applicant's shipments of household goods subsequent to that date were in wilful violation of the law and therefore are not admissible to show the need for the services provided.

The I.C.C., in reversing the order of the Operating Rights Review Board and again in this court, points out that in December of 1960 applicant filed a "grandfather petition" for authority to transpora household goods. The I.C.C. contends that although this petition was eventually denied in 1963, shipments of household goods made during its pendency were made, "under color of law." We fail to understand how the filing of a petition for authority, without more, can be said to supply the authority sought while the

petition is pending:

The evidence of shipments of household goods made by applicant prior to December of 1959 is too remote to be of any probative value in determining the need for applicant's services in 1963.

The only other evidence offered at the hearing by applicant as to the need for its proposed services was the testimony of three shippers. A representative of an accounting firm with a branch in Anchorage testified that his company had employed applicant on five separate occasions to move the household goods of employees between Seattle and Alaska, and was planning five more such moves. This witness stated that he had been satisfied with the service provided by applicant, that he found it convenient to deal with a carrier located in Anchorage, rather than in Seattle, and that he had experienced delay and difficulty when moves were attempted by employing carriers using the sea route. He admitted, however, that he had no experience with the services of North American, the only carrier authorized to carry household goods on the all-highway route between Seattle and Anchorage. Nor is there any indication his company had ever investigated the services offered by North American. For this reason, his testimony is of no probative value in showing that applicant's services would fill needs which are not adequately being met by the currently authorized carrier of household goods.

A representative of a general contractor in Fairbanks testified that his company needed the expedited motor carrier service proposed by the applicant. It had used the services of Lynden and other

carriers, and had no complaint as to any of the services rendered. While the representative indicated that his company was interested in expedited service, he was uncertain of the existing transit time in shipments by the authorized carriers. Furthermore, his testimony indicated that the bulk of his company's shipments were channeled through Great Falls, and therefore is not probative as to the need for the challenged grant of authority to transport general commodities between Seattle and Alaska.

A representative of an electrical equipment distributor testified that his company would benefit from expedited motor carrier service to Alaska from Great Falls and Seattle. Faster service was needed particularly in connection with shipments from its main plant in Virginia. This testimony, however, also was relevant primarily to the grant of authority to operate between Great Falls and Alaska, and did not constitute probative evidence as to the need for applicant's services between Seattle and Alaska.

We conclude that the Operating Rights Review Board correctly determined that at the hearing applicant adduced no substantial evidence, as that phrase is interpreted by the United States Supreme Court in Consolo v. Federal Maritime Commission, 383 US 607 (1966), of a need for any of its proposed services other than the transportation of non-household goods between Great Falls and Alaska. We therefore held the subsequent order of the I.C.C. to the contrary unlawful and plaintiffs are entitled to a decree enjoining its enforcement. The order is set aside and the case remanded to the I.C.C. for further proceedings consistent

with this opinion. Plaintiffs are directed to prepare a decree in conformity herewith to be presented to the court upon ten days' notice to counsel for the Government.

Dated this 9th day of February, 1967.

/s/ FREDERICK G. HAMLEY
United States Circuit Judge

/s/ WILLIAM J. LINDBERG
United States District Judge

/s/ WILLIAM T. BEEKS
United States District Judge

APPENDIX B

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
March 16, 1967
HAROLD W. ANDERSON, CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

LYNDEN TRANSFER, INC. and NORTH AMERICAN VAN LINES, INC., Plaintiffs, v. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.	CIVIL ACTION No. 289 Decree (Three Judge Court)

This cause came on regularly for hearing before this three-judge court on December 9, 1966; James T. Johnson appeared as counsel for plaintiffs and Manny H. Smith appeared as counsel for the defendants and the court having considered the record and files herein, having heard arguments of counsel, and having filed its Opinion; NOW, THEREFORE, IT IS HEREBY

ORDERED ADJUDGED AND DECREED that the Order of the Interstate Commerce Commission dated September 23, 1965, in the matter entitled "ALASKA TRUCK TRANSPORT, INC., EXTENSION-ALASKA" No. MC-118520 (Sub No. 3) is unlawful and the defendants United States of America and Interstate Commerce Commission, their employees, servants and agents be, and they are hereby, perpetually enjoined and restrained from enforcing said Order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said Order of the Interstate

Commerce Commission dated September 23, 1965, is hereby set aside and the matter remanded to the Interstate Commerce Commission for further proceedings consistent with the court's opinion filed herein February 7, 1967.

DATED this ____ day of March, 1967.

Frederick G. Hamley
United States Circuit Judge

William J. Lindberg
United States District Judge

William T. Beeks
United States District Judge

Presented by:

James T. Johnson
JAMES T. JOHNSON, of counsel
for plaintiffs